

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED

DEC 21 2001

IN RE: VITAMINS ANTITRUST
LITIGATION

NANCY MAYER-WHITTINGTON, CLERK
U.S. DISTRICT COURT

Misc. No. 99-197 (TFH)
MDL No. 1285

THIS DOCUMENT APPLIES TO:
ALL ACTIONS

MEMORANDUM OPINION

Re: Depositions of Witnesses Who Intend to Assert the Fifth Amendment

Pending before the Court are Rule 53 Objections to the Special Master's December 4, 2001 Report and Recommendations Respecting Certain Defendants' Motion for a Protective Order Re: Depositions of Witnesses Who Intend to Assert the Fifth Amendment ("Dec.4 Report"). These Objections were lodged by (1) Plaintiffs, (2) Certain Defendants,¹ and, (3) Defendant Degussa AG (f/k/a Degussa-Huls AG).² Defendants seek a protective order requiring that all depositions by plaintiffs of any witnesses who intend to assert the Fifth Amendment privilege at deposition shall proceed upon written question pursuant to Rule 31 rather than by oral examination pursuant to Rule 30. The Defendants object to the Special Master's

¹ Takeda Chemical Industries, Ltd., Takeda Vitamin & Food USA, Inc., Takeda USA, Inc., Takeda Chemical Products USA, Inc., F. Hoffman-La Roche Inc., Roche Vitamins Inc., Daiichi Pharmaceutical Co., Ltd., BASF AG, BASF Corp., Rhone-Poulenc S.A. (n/k/a Aventis S.A.), Rhone-Poulenc Animal Nutrition S.A. (n/k/a Aventis Animal Nutrition S.A.), Rhone-Poulenc S.A. (n/k/a Aventis S.A.), Rhone-Poulenc Animal Nutrition Inc. (n/k/a Aventis Animal Nutrition Inc.), Rhone-Poulenc Ag Company Inc. (f/k/a/ Rhone-Poulenc Inc. and n/k/a/ Aventis CropScience USA Inc.), Hoechst Marion Roussel S.A., Roussel Corp., Merck KGaA, E. Merck, Eisai Co., Ltd., Eisai USA Inc., and Eisai, Inc.

² Notably Degussa AG joined the original Motion for a Protective Order but filed a separate Objection bringing to light *for the first time* its own unique circumstances despite this Court's Order of March 1, 2000 that all discovery disputes be resolved, in the first instance, by the Special Master.

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recommendation that this motion be denied and that parties be required to follow a specific protocol for such depositions. Plaintiffs do not object to the protocol but seek clarification and modification of the Special Master's recommendations.

Upon consideration of the parties' briefs, the Dec. 4 Report, and the entire record herein, the Court adopts the reasoning of the Special Master's December 4, 2001 and accepts his recommendations that depositions of witnesses who declare their intent to assert the Fifth Amendment follow a protocol. The Defendants have not established good cause warranting a protective order requiring the depositions to proceed under Rule 31 and the Special Master has developed a protocol which will insure that Plaintiffs can obtain the discovery they request while reducing, to an extent, the burden to deponents and counsel. The Court, however, clarifies and modifies the protocol as follows:³

(1) Any witness who is presently employed by one of defendants and who intends to assert the Fifth Amendment would provide the plaintiffs' counsel no later than seven business days after receiving a notice of deposition, an affidavit or declaration affirming that intent, or an affidavit or declaration from his or her attorney expressing that intent. Any former employee who intends to assert the Fifth Amendment to all substantive questions would provide plaintiffs counsel the requisite affidavit within 14 days of receiving notice of deposition.⁴

³ The Court again notes that parties continue to use the Special Master process inefficiently. The process put in place to resolve discovery disputes was not meant to add an additional procedural step. The Court finds it particularly inappropriate in this instance where parties are asking the Court to take such detailed positions on discovery procedure.

⁴ The Court rejects Defendants' argument that this should be an optional procedure. See Defs. Rule 53 Obj. at 3. The Defendants' originally brought the underlying motion for a protective order to require that such witness, who may have had knowledge of or participated in the alleged vitamin conspiracies and may be facing criminal prosecution as a result, be required

(2) Plaintiffs would provide a list of written questions to each of the prospective witnesses (from whom affidavits or declarations are received) no later than 11 business days before the date on which their deposition is noticed.⁵ This list shall include all questions to be asked, including the 40 questions (discussed *infra*) to be posed orally, however, the questions to be posed orally by Plaintiffs' counsel, do not have to be specifically identified in advance.⁶

(3) After establishing the identity of each witness, plaintiffs could continue with a videotaped, oral deposition consisting of no more than 40 oral questions. As the Dec. 4 Report makes clear, this should be sufficient for trial purposes when taken together with the deponent's summary oral answer to the remaining written questions which were provided in advance. The written list of questions and any associated documents will be introduced at the videotaped deposition as an

to be deposited under Rule 31 rather than Rule 30 as an "efficient method of obtaining these witnesses." See Defs. Sept. 28 Mem. of Law. In fact, the entire premise of the underlying motion seemed to be the need to create a "streamlined process" for taking the depositions by written questions. The Special Master's recommended protocol establishes a streamlined procedure. To argue now that the procedure should be optional serves only to perpetuate the uncertainty and delay which has plagued discovery in this case. The Special Master's protocol adds certainty and finality to this contested issue.

⁵ Plaintiffs have requested that the Court shorten the time to provide written questions to five business days given that the bulk of the Rule 30(b)(6) depositions will not be completed until mid- January and that these depositions will form the factual predicate for examination of the deponents invoking the Fifth Amendment. Plaintiffs also cited the looming discovery cutoff of February 11, 2001. Defendants counter that the eleven days as recommended is needed due to the possible need for translations and the filing of objections. In light of the Court's December 13, 2001 modifying the deadline as a deadline for notification rather than completion and the fact that the deponents are likely to have to review lengthy documents (with possible need for translation), the Court will not reject the Special Master's recommendation.

⁶ The protocol is invoked only if a witness intends to assert the Fifth Amendment privilege to all substantive questions. The Defendants' have offered no reason *why* the 40 questions should be identified in advance. Further the Plaintiffs' have conceded that they are willing to provide a list of all questions in advance. The Court finds that providing this written list is sufficient under the protocol.

exhibit and the deponent will be asked summarily whether he or she would assert the privilege in response to all the questions on the list if asked orally. If the deponent answers "yes" the deposition terminates. The deposition could proceed under Rule 30, however, if the deponent chose to answer any substantive questions.

(4) Plaintiffs can use the oral answer indicating the deponent's intent to assert the privilege in response to all written questions for any lawful purpose, including to seek adverse inferences.

(5) Absent good cause, defendants are precluded from calling any Interrogatory No. 5B witness who, pursuant to the protocol, files a declaration of intent to plead the Fifth Amendment to all substantive questions and, pursuant to that declaration, is not deposed or, if deposed, does in fact plead the privilege to all substantive questions posed.

(6) Any witness who wished to recant his or her assertions of the Fifth Amendment privilege would have to do so no later than seven business days after the deposition, *except for good cause shown*, and, thereafter agree to be deposed orally in Washington D.C., or such location in the United States as may be agreed by the parties within fourteen business days following notice of decision not to assert the privilege.⁷

(7) Any witness who served on the plaintiffs, pursuant to the protocol, a declaration of intent to plead the Fifth Amendment and who wished to recant that declaration and provide substantive testimony, would be required to give notice of his or her change of intention no later than 5 business days before the February 11, 2002 fact discovery notification deadline, except for good

⁷ The Court is not convinced that Defendants' suggested modifications would introduce anything but additional uncertainty to discovery in this case. The Defendants suggest that the recant deadline does not consider factors likely to cause a witness to recant, such as the entry of a plea or the running of a statute of limitations. This assertion is baseless given the fact that Defendants may recant beyond the seven days for good cause shown.

cause shown, and, thereafter make him or herself available for deposition within 15 days in Washington D.C., or other such location in the United States as may be agreed upon by the parties;

(8) Defendants' Objections to any questions on the written list submitted by the Plaintiffs shall be filed no later than five business days before the date for which each deposition has been noticed. While this was not part of the Special Master's recommended protocol, the Defendants requested that an objection procedure be adopted and the Plaintiffs did not oppose such a procedure as long as it did not complicate the protocol. This does add an additional step, however, as previously noted, the February 11, 2001 deadline has been modified thus affording Plaintiffs additional time in which to complete fact discovery.

(9) Defendants will not be precluded from asking the deponents questions. Defendants must submit their written questions no later than 11 business days before the date on which their deposition is noticed. Plaintiffs may serve objections to these questions no later than five business days before the date for which each deposition has been noticed.

(10) Lastly, the Court adopts the Plaintiffs' request to conduct complete question by question Rule 30 depositions of (i) up to six current or former employees of Roche and up to four current or former employees of BASF who affirmatively declare their intent to assert the Fifth Amendment, and (ii) up to three witnesses of each other defendant or defendant group who intend to assert the Fifth Amendment privilege.

The Special Master did not directly address this request,⁸ however, he did address the

⁸ The Special Master used as a basis for his recommended protocol, the procedures outlined by Plaintiffs in a letter dated August 27, 2001.

general arguments for and against this provision. See Dec. 4 Report at 11-16. The Court adopts this reasoning in ordering the last provision. Plaintiffs requested this last provision - taking complete depositions of key witnesses - to "insure that plaintiffs will have the flexibility to offer this testimony at trial as they see fit...." As the Special Master correctly noted, a party is generally entitled to the discovery method of this own choosing. See Dec. 4 Report at 11. This presumption is enshrined in Rule 26 itself, which reflects that discovery shall proceed by a party's chosen method absent good cause. See Fed. R. Civ. P. 26(c); see also Interlego A.G. v. Leslie-Henry Co., 32 F.R.D. 9, 11 (M.D. Pa. 1963) (denying defendant's motion to require depositions upon written questions in lieu of oral depositions and noting that "[i]n the absence of special circumstances the court should ordinarily allow the examining party to choose his own method of examination.").

Defendants' however argued that the depositions proceed upon written questions in order to reduce the burden to deponents and counsel. See Gatoil, Inc., v. Forest Hill State Bank, 104 F.R.D. 580, 581-82 (D. MD 1985); Moretti v. Herman's Sporting Goods, Inc., C.A. No. 88-0111, 1988 U.S. Dist. LEXIS 12711, at *5-6 (E.D. Pa. Nov. 8, 1988); First Fidelity Bancorporation v. National Union Fire Insurance Co., Civ. A. No. 90-1866, 1992 WL 46881, at *4 (Mar. 5 1992). Defendants also asserted that the intent of the depositions was to embarrass or harass. Lastly, Defendants argued that need to reduce the burden to deponents and counsel constitutes good cause to warrant the requested protective order.

Plaintiffs' countered that Rule 31 depositions are inferior substitutes to Rule 30 depositions and that courts have ordered depositions to proceed under Rule 30 even though the witness expressed an intent to assert the Fifth Amendment in response to all questions. See In re

Mann, 220 BR 351, 356 (Bankr. N.D. Ohio 1998); National Life Insurance Co. v. Hartford Accident & Indemnity Co., 615 F. 2d 595, 599-600 (3d Cir. 1980). Further, Plaintiffs argued they should be able to choose their method of discovery.

The Court finds that the Plaintiffs should be allowed to choose their desired method of discovery and that the additional Rule 30 depositions of witnesses alleged to be key participants in the alleged conspiracy is warranted to insure that Plaintiffs can effectively prepare and present their case. As the Special Master noted "[w]ith few surviving conspiracy documents, depositions of witnesses [who participated in or knew of the conspiracy] are the Plaintiffs best chance to obtain direct evidence about the conspiracy...." Dec. 4 Report at 18.

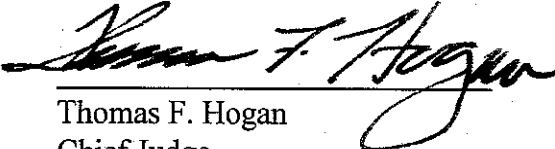
Defendant Degussa A.G. submitted its own Rule 53 Objection to the Dec. 4 Report arguing that due to its particular circumstances - a guilty plea that has not been finalized - the recant deadline imposed by the protocol would unfairly limit substantive testimony by Degussa A.G. witnesses; and, that the protocol unnecessarily exposes witnesses to arrest in the United States.⁹ The Court does not accept the first argument for the reasons stated above with respect to provision six (6) of the protocol. In addition, concerning the second argument, the Court will not except Degussa A.G. from the protocol based on the unique circumstances of its witnesses which focus primarily on location of the depositions due to criminal problems. Degussa A.G. will not be heard to assert such a position at this late date when the very issue of deposition location of foreign defendants has been extensively briefed and argued before both the Special Master and this Court.

⁹ Degussa A.G. specifically notes that Mr. Manfred Ficher was specifically excluded from the plea agreement by the Department of Justice and therefore even were the plea to be finalized this potential deponent would be subject to arrest in the United States.

Conclusion

For the foregoing reasons, the Court affirms the recommendations of the Special Master in the December 4, 2001 Report with the modifications and clarifications as described above. The Defendants have not established good cause under Rule 26(c), therefore, the Court denies the Defendants' motion for a protective order requiring that all depositions by plaintiffs of any witnesses who intend to assert the Fifth Amendment privilege at deposition shall proceed upon written question pursuant to Rule 31 rather than by oral examination pursuant to Rule 30. Depositions of witnesses intending to assert the Fifth Amendment shall proceed under the protocol as laid out by the Special Master in the Dec. 4 Report and as modified and clarified by this Memorandum Opinion.

December 21st, 2001


Thomas F. Hogan
Chief Judge

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NANCY MAYER-WHITTINGTON, CLERK
U.S. DISTRICT COURT

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**THIS DOCUMENT APPLIES TO:
ALL ACTIONS.**

Re: Depositions of Witnesses Who Intend to Assert the Fifth Amendment

ORDERED that the Special Master's December 4, 2001 Report and Recommendation is **AFFIRMED AS MODIFIED** by this Order and the accompanying Memorandum Opinion; Specifically, it is hereby

ORDERED that the Court adopts the protocol, as modified, for depositions of witnesses who intend to assert the Fifth Amendment as set forth in the Special Master's December 4, 2001 Report and Recommendation. The modifications are as follows:

- (1) Any witness who is presently employed by one of defendants and who intends to assert the Fifth Amendment would provide the plaintiffs' counsel no later than seven business days after receiving a notice of deposition, an affidavit or declaration affirming that intent, or an affidavit or declaration from his or her attorney expressing that intent. Any former employee who intends to assert the Fifth Amendment to all substantive questions would provide plaintiffs counsel the requisite affidavit within 14 days of receiving notice of deposition.

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(2) Plaintiffs will provide a list of written questions to each of the prospective witnesses (from whom affidavits or declarations are received) no later than 11 business days before the date on which their deposition is noticed. This list shall include all questions to be asked, including the 40 questions (discussed infra) to be posed orally, however, the questions to be posed orally do not have to be specifically identified in advance.

(3) After establishing the identity of each witness, plaintiffs could continue with a videotaped, oral deposition consisting of no more than 40 oral questions. The written list of questions and any associated documents will be introduced at the videotaped deposition as an exhibit and the deponent will be asked summarily whether he or she would assert the privilege in response to all the questions on the list if asked orally. If the deponent answers "yes" the deposition terminates. The deposition will proceed under Rule 30, however, if the deponent chose to answer any substantive questions.

(4) Plaintiffs can use the oral answer indicating the deponent's intent to assert the privilege in response to all written questions for any lawful purpose, including to seek adverse inferences.

(5) Absent good cause, defendants are precluded from calling any Interrogatory No. 5B witness who, pursuant to the protocol, files a declaration of intent to plead the Fifth Amendment to all substantive questions and, pursuant to that declaration, is not deposed or, if deposed, does in fact plead the privilege to all substantive questions posed.

(6) Any witness who wished to recant his or her assertions of the Fifth Amendment privilege would have to do so no later than seven business days after the deposition, except for good cause shown, and, thereafter agree to be deposed orally in Washington D.C., or such location in the United States as may be agreed by the parties within fourteen business days following notice of decision not to assert the privilege.

(7) Any witness who served on the plaintiffs, pursuant to the protocol, a declaration of intent to plead the Fifth Amendment and who wished to recant that declaration and provide substantive testimony, would be required to give notice of his or her change of intention no later than 5 business days before the February 11, 2002 fact discovery notification deadline, except for good cause shown, and, thereafter make him or herself available for deposition within 15 days in Washington D.C., or other such location in the United States as may be agreed upon by the parties.

(8) Defendants' Objections to any questions on the written list submitted by the Plaintiffs shall be filed no later than five business days before the date for which each deposition has been noticed.

(9) Defendants will not be precluded from asking the deponents questions. Defendants

must submit their written questions no later than 11 business days before the date on which their deposition is noticed. Plaintiffs may serve objections to these questions no later than five business days before the date for which each deposition has been noticed.

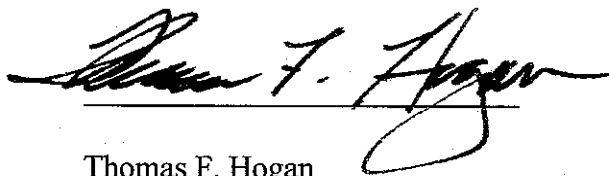
(10) Plaintiffs may conduct complete, question by question, Rule 30 depositions of (i) up to six current or former employees of Roche and up to four current or former employees of BASF who affirmatively declare their intent to assert the Fifth Amendment, and (ii) up to three witnesses of each other defendant or defendant group who intend to assert the Fifth Amendment privilege.

It is further hereby

ORDERED the Special Master will ensure that this ORDER and the accompanying MEMORANDUM OPINION is submitted for posting on Verilaw.

SO ORDERED

December 21st, 2001

A handwritten signature in black ink, appearing to read "Thomas F. Hogan", written over a horizontal line.

Thomas F. Hogan

Chief Judge